

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #2-79:

KALISPELL FEDERATION OF TEACHERS,

Complainant,

- vs -

FINAL ORDER

KALISPELL EDUCATION ASSOCIATION,  
MONTANA EDUCATION ASSOCIATION,  
and FEATHEAD COUNTY SCHOOL  
DISTRICT NO. 5,

Defendants.

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The Findings of Fact, Conclusions of Law and Recommended  
Order were issued by Hearing Examiner Barry F. Smith on  
September 12, 1979.

Attorney for Defendant, Montana Education Association,  
Emilia Loring, filed Exceptions to the Findings of Fact, Conclusions  
of Law and Recommended Order on September 27, 1979.

After reviewing the record and considering the briefs and  
oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant,  
Montana Education Association, to the Hearing Examiner's Findings  
of Fact, Conclusions of Law and Recommended Order are hereby  
denied.

2. IT IS ORDERED, that this Board therefore adopts the  
Findings of Fact, Conclusions of Law and Recommended Order of  
Hearing Examiner Barry F. Smith, as the Final Order of this Board.

DATED this 11<sup>th</sup> day of December, 1979.

BOARD OF PERSONNEL APPEALS

By Brent Cromley  
Brent Cromley  
Chairman

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

KALISPELL FEDERATION OF TEACHERS,

Complainant,

-vs-

KALISPELL EDUCATION ASSOCIATION  
MONTANA EDUCATION ASSOCIATION,  
and FLATHEAD COUNTY SCHOOL  
DISTRICT NO. 5

Defendants.

ULP #2-1979  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
and RECOMMENDED ORDER

\* \* \* \* \*

The Complainant in this matter filed its complaint with the Board of Personnel Appeals on January 4, 1979, alleging that Defendants had committed unfair labor practices by coercing the employees of the Flathead County School District in the exercise of rights guaranteed by Montana Code Annotated (hereinafter MCA) 39-31-201 (formerly codified as Revised Codes of Montana, 1947 (hereinafter R.C.M. 1947), section 59-1605 (1)(a) and (b) (Supp. 1977)). Specific allegations were:

(1) Defendant Flathead County School District No. 5 violated MCA section 39-31-401(1) and (2) (formerly R.C.M. 1947, section 59-1605(a)(a) and (b) (supp. 1977)) by withholding monies from employee paychecks in the amount of dues of Defendant Montana Education Association (MEA) without contractual authority or individual authorization, thereby interfering with section 39-31-201 rights and dominating and assisting in the formation and administration of a labor organization, namely, the Kalispell Education Association (KEA) and MEA.

(2) Defendant MEA willfully violated MCA section 39-31-402(1) (formerly R.C.M. 1947, section 59-1605(2)(a) (Supp. 1977)) by restraining and coercing employees in the exercise of the rights guaranteed in section 39-31-201 and by causing Defendant School District unlawfully to withhold monies in the amount of the dues of MEA.

Defendants KEA and MEA filed an answer and motion to dismiss on January 17, 1979, denying the charges in the complaint that

1 they had interfered with section 39-31-201 rights of the employees.  
2 A further motion to dismiss was filed on January 26, 1979, alleging  
3 the complaint was defective in that it was not signed and verified  
4 by the complainant or its authorized representative. Defendant  
5 School District answered January 24, 1979 denying the charges  
6 against it.

7 The Board scheduled hearing in that matter on March 14,  
8 1979, before Hearing Examiner Barry F. Smith. Pursuant to a  
9 motion by Complainant to continue the hearing, the matter was  
10 rescheduled to be heard on April 9, 1979. The Hearing Examiner  
11 and the parties met on that date and conducted a pre-hearing  
12 conference, continuing the hearing until May 5, 1979, to allow  
13 the attendance of a witness unable to attend the April hearing.  
14 Full hearing was held on the May date in the conference room of  
15 the Flathead County School District No. 5. office, 233 First  
16 Avenue East, Kalispell, Montana. Kalispell Federation of Teachers  
17 Field Representative Cordell R. Brown represented Complainant.  
18 Attorney Emilie Loring represented Defendant Associations, and  
19 County Attorney Ted Lympus represented Defendant District.

20 Defendant MEA presented a motion to dismiss at the hearing  
21 on the ground that it had not been properly served with notice of  
22 the complaint. The Hearing Examiner took the motion under advise-  
23 ment and requested the hearing proceed as if MEA had been properly  
24 served. MEA withdrew its motion on May 14, 1979. Defendant  
25 School District also moved at the hearing that charges against it  
26 be dismissed.

27 Following hearing of the matter, Complainant filed its brief  
28 with the Hearing Examiner June 29, 1979, one month later than  
29 agreed at the hearing. Complainant voluntarily waived its right  
30 to file a reply brief. Defendant Associations filed their brief  
31 on August 2, 1979. No brief was received by Defendant District  
32 prior to resolution of this matter.

1 The following exhibits were admitted into evidence at the  
2 hearing:  
3 Joint Exhibit 1--MEA Constitution (amended April, 1978) and  
4 sample constitution of MEA local.  
5 Joint Exhibit 2--KEA Constitution.  
6 Joint Exhibit 3--MEA membership form (1977-78).  
7 Joint Exhibit 4--Payroll Deduction Authorization form for Kalispell  
8 Public Schools.  
9 Joint Exhibit 5--Letter from William Mulhollan to MEA's Helena  
10 office (September 25, 1978).  
11 Joint Exhibit 6--Letter to William Mulhollan from Raymond Randels,  
12 MEA interim executive secretary (September 29, 1978).  
13 Joint Exhibit 7--Paragraph 5.2 of the 1976-77 school year's  
14 agreement between the Board of Trustees of Kalispell Public  
15 Schools and KEA.  
16 Joint Exhibit 8--Paragraph 5.2 from the agreement between the  
17 same parties for the 1977-78 school year.  
18 Joint Exhibit 9--Paragraph 5.2 from the agreement between the  
19 same parties for the 1978-79 school year.  
20 Complainant's Exhibit 1--Form letter from Raymond Randels to  
21 teachers whose MEA dues are not 50% paid and requesting that  
22 the dues be paid.  
23 Complainant's Exhibit 2--November 29, 1978, issue of KEA News &  
24 Views, admitted into evidence only to the extent that certain  
25 portions of it refreshed the recollections of witness Donna  
26 Maddux.  
27 Complainant's Exhibit 3--Form letter from Maurice Hickey, MEA  
28 executive secretary to business managers and school clerks  
29 (August 1, 1978).  
30 Complainant's Exhibit 4--Full agreement for the 1978-79 school  
31 year between Kalispell School Board of Trustees and KEA.  
32 Complainant's Exhibit 5--A copy of the letter that is Complainant's

1 Exhibit 1 addressed to Mary Granger (February 12, 1979).  
2 Complainant's Exhibit 6--Letter to John Board at MEA's Helena  
3 Office from KEA Secretary Maureen Laird concerning the KEA's  
4 November 28, 1978 meetings (November 28, 1978).  
5 Defendant KEA-MEA's Exhibit 2--Memorandum from John Board to MEA  
6 unit presidents regarding membership plans (April 12, 1978).  
7 Defendant KEA-MEA's Exhibit 3--Letter from John Board to MEA  
8 members concerning the continuing membership program (April  
9 13, 1978).  
10 Defendant KEA-MEA's Exhibit 4--Letter from John Board to MEA unit  
11 presidents and contacts concerning the continuing membership  
12 program's administration (August, 1978).  
13 Defendant KEA-MEA's Exhibit 5--MEA 1978-79 instructions for  
14 processing memberships.  
15 Defendant KEA-MEA's Exhibit 6--Letter to KEA-MEA members to be  
16 distributed fall 1978 by building representatives indicating  
17 necessity to send notice of withdrawal of membership by  
18 September 18.  
19 Defendant KEA-MEA's Exhibit 7--Memorandum from Gail Atkinson to  
20 KEA building representatives setting out deadlines for the  
21 membership drive (September 5, 1978).  
22 Defendant District's Exhibit 1--Letter to Superintendent Keith  
23 Allred from MEA Uniserv Region 1 Director Michael Keedy  
24 (November 29, 1978).

#### 25 FINDINGS OF FACT

26 Upon a consideration of the entire record in this matter,  
27 including exhibits and sworn testimony, the Hearing Examiner  
28 hereby makes the following Findings of Fact:

29 1. The Kalispell Education Association (KEA), a local of  
30 the Montana Education Association (MEA) is the certified collec-  
31 tive bargaining representative of the teachers of Flathead County  
32 School District No. 5 (District).

1       2. The collective bargaining contracts between KEA and the  
2 Board of Trustees of the District (Complainant's Exhibit 4) is an  
3 open shop agreement, one not requiring the payment of dues to any  
4 labor organization.

5       3. Paragraph 5.2 of the collective bargaining agreement  
6 (Joint Exhibit 9) provides that the Board of Trustees for the  
7 District will deduct the professional dues of KEA members from  
8 their paychecks upon written authorization by the members on  
9 forms provided by the District.

10       4. Membership forms distributed to KEA members in the fall  
11 of 1977 (Joint Exhibit 3) gave them the option of paying their  
12 dues by cash or having the dues deducted from their paychecks.  
13 The payroll deduction option on the cards is written in the form  
14 of an authorization. The cards provided that those desiring to  
15 have their dues deducted from their paychecks would be subject to  
16 MEA's continuing membership policy, under which a member's deduc-  
17 tion authorization would automatically be renewed for another  
18 year unless the member supplied written revocation of his authori-  
19 zation between August 15 and September 10 of any following year.

20       5. Twenty-three KEA members who were subject to the con-  
21 tinuing membership program by checking the appropriate box on  
22 Joint Exhibit 3 were not paying dues either by cash or payroll  
23 deduction, at the time of the hearing. This was the uncontro-  
24 verted testimony of KEA President Donna Maddux. She did not say  
25 how many of these members, if any, gave proper notice of with-  
26 drawal of their memberships, but the testimony of KFT President  
27 Connie Wagner indicates that none of them did. She testified  
28 that Ms. Maddux had told her that something would have to be done  
29 about getting the dues of those twenty-three members.

30       6. Sixteen KEA members initially had their dues withheld  
31 from their paychecks against their will during the 1978-79 school  
32 year. This was the testimony of Ms. Maddux, supported by Thomas

1 Trumbull, director of business affairs for the school district,  
2 who said there were 12 at one time, but that there could have  
3 been more initially.

4 7. Ten of those sixteen members had their dues refunded  
5 then since the deductions of the 1978-79 school year began. This  
6 was the testimony of Ms. Maddux, supported by Mr. Trumbull, who  
7 listed the remaining six as William Mulhollan, George Cowan,  
8 Virginia Oursland, Alvera Schmidt, Janet Thon, and Lorna Wilson.  
9 Their dues are being deducted and held in trust by the school  
10 district pending resolution of the matter by this hearing. Each  
11 of the six signed a payroll deduction authorization (Joint Exhibit  
12 4) in the fall of 1978 either allowing deductions for KFT or  
13 asking that none be taken out.

14 8. Notice of the continuing membership program and of the  
15 option of terminating membership by cancelling payroll deductions  
16 by written notice between August 15 and September 10 was sent to  
17 KEA members in a letter dated April 13, 1978 (Defendant MEA-KEA's  
18 Exhibit 3). The letter was sent by John C. Board, MEA president,  
19 to the members' homes. A further letter that mentioned the  
20 window period (Defendant KEA's Exhibit 5) was distributed to all  
21 previous members by the building representatives in late August,  
22 1978. This testimony, given at the hearing by KEA Membership  
23 Chairman Gail Atkinson, was substantially uncontroverted, although  
24 other testimony at the hearing made it obvious that there still  
25 was considerable confusion among the teachers as to the effect of  
26 the continuing membership program. Teacher William Mulhollan,  
27 who had checked the payroll deduction on the MEA membership form  
28 (Joint Exhibit 3) in September, 1977, testified that he became  
29 aware of the "window period" specified by that form in early  
30 September, 1978. Teacher George Cowan checked the payroll deduc-  
31 tion provision on the Joint Exhibit 3 form the fall of 1977, but  
32 testified he was not aware of his obligation to act to cancel his

1 membership in the KEA until late September or early October,  
2 1978.

3 9. The District's Payroll Deduction Authorization form  
4 (Joint Exhibit 4) was developed when District Superintendent  
5 Keith Allred took office on July 1, 1977, and was used that fall  
6 for most, if not all, payroll deductions. Mr. Trumbull's testi-  
7 mony to that effect was contradicted somewhat by Ms. Atkinson's  
8 testimony that she did not think the District's form had been  
9 used in the last two years. She admitted, however, that she  
10 could not testify to that point "for a fact", and Mr. Trumbull  
11 certainly is in a better position to know when the forms have  
12 been used because of his task of processing them in Mr. Allred's  
13 office.

14 10. Mr. Mulhollam notified the MEA office in Helena by  
15 letter dated September 25, 1978 (Joint Exhibit 5), that he wished  
16 to discontinue his membership with that organization. By return  
17 letter on September 29 (Joint Exhibit 6), MEA Interim Executive  
18 Secretary Raymond Randels indicated to Mr. Mulhollam that his  
19 notice was ineffective because of its being sent after September  
20 10.

21 11. Teacher Maureen Danner told her KEA building represen-  
22 tative that she wanted out of the association before September  
23 10, 1978. She was directed to Michael Keedy, director of MEA  
24 Uniserv Region 1, who sent her to Mr. Trumbull. Mr. Trumbull  
25 gave her the District Payroll Deduction Authorization form (Joint  
26 Exhibit 4), on which she indicated she wanted dues deducted  
27 for KFT. The change in deductions for KFT rather than for KEA  
28 began with her January, 1979, paycheck. Mr. Keedy wrote Mr.  
29 Allred on November 29, 1978 (Defendant District's Exhibit 1),  
30 asking that Ms. Danner's deductions be returned to her, which has  
31 since been done.

32 12. Teacher Mary Granger signed the MEA membership form  
(Joint Exhibit 3) in 1977, checking the "cash" provision. She

1 has not had dues deducted from her paycheck, but is receiving  
2 bills for MEA dues, even though the "cash" provision on the  
3 membership form does not subject the signer to the continuing  
4 membership program. Mr. Randels wrote her on February 12, 1979  
5 (Complainant's Exhibit 5), requesting payment of her dues.

6 13. Of the six teachers whose payroll deductions are con-  
7 tinuing against their will and being put in trust, two are KFT  
8 members. The KFT is "absorbing the costs" of the KFT memberships.  
9 This was the uncontroverted testimony of KFT President Wagner who  
10 also said confusion about teachers' right to withdraw from KEA  
11 outside of the window period hampered the recruitment efforts of  
12 the KFT. She testified without contradiction that some teachers  
13 saw the continuing deduction of MEA dues by the District as  
14 giving legitimacy to the idea they were still MEA members and  
15 thus did not want to join KFT until they were sure they could.

16 14. Mr. Trumbull received a call from the MEA office in  
17 Helena to "remind" him of the window period specified by the  
18 association's continuing membership program. The caller told him  
19 the association was making similar calls to all districts. In a  
20 form letter sent to Mr. Trumbull by MEA Executive Secretary  
21 Maurice Hickey (Complainant's Exhibit 3, dated August 1, 1978),  
22 Mr. Trumbull was told that the 1977-78 signed membership forms  
23 served as an authorization to continue to withhold dues for those  
24 MEA members already on payroll deduction. Paragraph 3 of the  
25 letter sent to Mr. Allred by Mr. Keedy (Defendant District's  
26 Exhibit 1), while requesting that the dues of any teachers con-  
27 complying with the window period be refunded, said that MEA made no  
28 such request for teachers not so complying. Mr. Trumbull testi-  
29 fied that he understood from that paragraph that the District  
30 could not discontinue deductions for those teachers supplying  
31 their notices after September 10, 1978.

32 15. The KEA members voted unanimously at a November 25,  
1978 meeting to protest KEA's strict enforcement of the continuing

1 membership program (see Complainant's Exhibit 2, the November 29,  
2 1978, issue of KEA News & Views, paragraph 1, supported by the  
3 testimony of KEA President Maddux). The membership at that  
4 meeting also voted to withhold all KEA members' dues from MEA  
5 until the dues of the defecting members were refunded. As Ms.  
6 Maddux testified, however, that step never was taken. Secretary  
7 Maureen Laird of the KEA notified MEA President John Board by  
8 letter of the motions voted on at that meeting (Complainant's  
9 Exhibit 6).

#### 10 DISCUSSION

#### 11 I. MOTIONS TO DISMISS

#### 12 A. Defendants KEA and MEA

13 Defendants KEA and MEA first moved to dismiss the complaint  
14 against them in their answer, of January 17, 1979, citing para-  
15 graph 5.2 of the comprehensive agreement between the Defendant  
16 District and KEA for the 1978-79 school year (Joint Exhibit 9).  
17 That paragraph says that the Board of Trustees will make deduc-  
18 tions from employee paychecks for KEA-MEA dues upon authorization  
19 from the employees. It states that authorization will be through  
20 forms provided the employees by the Defendant District.

21 Citation of that provision could afford no basis for dis-  
22 missal of the complaint at that time because the motion was not  
23 accompanied by affidavit or other evidence that the contractual  
24 provision has been complied with. For the purposes of that  
25 motion to dismiss, Complainant's allegations that deductions were  
26 without authority must be deemed to be true unless clear evidence  
27 were provided to the contrary. No such evidence was presented at  
28 the time of the motion.

29 Defendants KEA and MEA further moved to dismiss the com-  
30 plaint against them on January 26, 1979, alleging that the complaint  
31 was defective in not complying with Administrative Rules of  
32 Montana section 24.26.580(2), which requires that the charge be

1 signed and verified by the complainant or its authorized representative.  
2 Although the motion did not elaborate, presumably it was based on  
3 the fact that the complaint named Shauna Thomas as the charging  
4 party's representative, but was signed by Field Representative  
5 Cordell R. Brown. Even if Mr. Brown properly cannot be considered  
6 the agent of Shauna Thomas (there is no reason presented to  
7 believe that he is not), as field representative of the Complain-  
8 ant he easily can qualify as its representative for purposes of  
9 signing a complaint. It makes no substantial difference that  
10 someone else's name rather than his was typed in the blank. The  
11 best practice would be to keep the information on the complaint  
12 consistent, but minor inconsistencies will not be allowed to  
13 prejudice the rights involved.

14 The motions are denied.

15 3. Defendant District

16 Defendant District's counsel moved in his closing argument  
17 for dismissal of the complaint against his client because of the  
18 District's lack of concern over who or which organization legally  
19 is entitled to the monies held in trust by the District. He  
20 argued that the District is a mere stakeholder in the matter and  
21 pointed to the statement of Complainant's representative made in  
22 closing argument that it was not alleging that Defendant District  
23 had the desire to assist or hurt any labor organization. He  
24 alleged that Complainant had failed to establish a prima facie  
25 case against his client because of the lack of proof of intent to  
26 interfere with employee rights. Counsel accompanied his motion  
27 with an affirmation of the District's willingness to abide by any  
28 decision reached in this hearing.

29 An employer's lack of intent to interfere with employee  
30 rights under MCA section 39-31-201 (1978) is not necessarily  
31 controlling in considering whether the employer has committed an  
32 MCA section 39-31-401(1) (1978) unfair labor practice. Section

1 401(1) makes it an unfair labor practice for an employer to  
2 "interfere with, restrain, or coerce employees" in the exercise  
3 of their guaranteed rights. Although an employer does not intend  
4 that his actions interfere with employee rights of, for example,  
5 self-organization (section 201), section 401(1) makes the employer  
6 liable for his actions when their practical effect is to hamper  
7 those rights. It thus would be improper to dismiss the complaint  
8 against the District merely because the issue of motive and  
9 intent has not been proved.

10 It could be that motive might be a relevant factor when the  
11 public employer has legitimate interests as the implementer of  
12 public policy in performing the alleged illegal acts. This  
13 matter more properly will be considered in section III of this  
14 discussion, which goes to the merits of all the arguments and all  
15 the evidence presented in this controversy, rather than in the  
16 context of a motion to dismiss for failure to present a prima  
17 facie case. For that reason, the motion is denied.

## 18 II. THE EMPLOYEES' RIGHT TO WITHDRAW THEIR AUTHORIZATIONS

### 19 A. The Validity of the Continuing Membership Program

20 Montana has a general provision allowing the deduction of  
21 union dues from employee paychecks by a public employer. MCA  
22 section 39-31-203 (1976) (formerly codified as R.C.M. 1947,  
23 section 59-1612 (Supp. 1977)) says:

24 Upon written authorization of any public  
25 employee within a bargaining unit, the public  
26 employer shall deduct from the pay of the public  
27 employee the monthly amount of dues as certified  
by the secretary of the exclusive representative  
and shall deliver the dues to the treasurer of  
the exclusive representative.

28 This section says nothing about how long the authorization may be  
29 made irrevocable, what sort of automatic renewal provisions are  
30 acceptable, or who must supply the authorization forms. On its  
31 face, section 203 seems to allow any kind of authorization condi-  
32 tion freely entered into by the employees, regardless of irrevoc-

1 cability, automatic renewal, or a requirement of the use of  
2 certain forms.

3 In short, since section 203 provides no other condition than  
4 that there be a "written authorization" by the public employee  
5 before the employer is authorized to deduct union dues from the  
6 employee's paycheck, it would seem that any reasonable conditions  
7 voluntarily agreed to by the employee as prerequisite to with-  
8 drawing his or her authorization are allowed under the statute.

9 1. Comparing Federal Law

10 Federal labor law governing the private sector provides in  
11 section 302(c)(4) of the Labor-Management Relations Act, (LMRA),  
12 29 U.S.C. section 186(c)(4) (1976), that employers may deduct  
13 union dues from employee paychecks and pay the money over to the  
14 union when the employee has executed a written authorization and  
15 the authorization is not irrevocable for more than one year or  
16 beyond the termination of the "applicable" collective bargaining  
17 agreement, whichever occurs sooner. Note that the latter provi-  
18 sion is not contained in the Montana statute.

19 The case of Brooks v. Continental Can Corp. 59 L.R.R.M. 2779  
20 (S.D. N.Y. 1965), tested the validity of an automatic renewal  
21 provision against the statutory language and found the provision  
22 valid because it did not contravene employee rights set out in  
23 the statute. In that case, an employee sought to enjoin the  
24 employer from continuing to deduct union dues from paychecks on  
25 the grounds that the original authorization, made more than one  
26 year before the action, was no longer effective, in spite of a  
27 provision in the authorization that automatically renewed the  
28 authorization unless the employee supplied written notice between  
29 10 and 30 days before the earlier of the expiration of the col-  
30 lective bargaining agreement and the one-year anniversary of the  
31 authorization. The automatic renewal was contained in both the  
32 collective bargaining agreement and an individual authorization.

The court held that the employee was bound by his decision

1 to agree to the automatic renewal provision:

2 All that the statute requires is that the written  
3 assignment "not be irrevocable for a period of more  
4 than one year." Here the assignment provided for a  
5 twenty day period each year when plaintiff could ter-  
6 minate the assignment. Under this arrangement (sic),  
he was free to choose whether or not he wanted the  
assignment in effect and irrevocable for each succeeding  
year. The assignment was not "irrevocable for a period  
of more than one year."

7 Id. at 2782.

8 The refusal of an employer to deduct dues from wages was  
9 found to be legal in Anheuser-Busch v. International Brotherhood  
10 of Teamsters, 584 F.2d 41 (4th Cir. 1978), however, because the  
11 employees tendered their revocations between the expiration of  
12 one bargaining contract and the execution of the next one. The  
13 court adopted the rationale that the authorizations must be  
14 revocable at will during the hiatus between contracts because  
15 there was no termination date by which the employees could deter-  
16 mine one of the escape times allowed in section 302(c)(4): Id.  
17 at 44.

18 The National Labor Relations Board held similarly in Printing  
19 Specialties Union, 215 N.L.R.B. No. 15, 87 L.R.R.M. 1744 (1974),  
20 enf'd 523 F.2d 783 (5th Cir. 1975). It refused to interpret  
21 "applicable collective agreement" in section 302(c)(4) to mean a  
22 subsequent collective agreement, which would have allowed the  
23 union forever to negate one of the section 302(c)(4) rights by  
24 "always negotiating a new agreement prior to the contractually  
25 created escape period, which here began 15 days before the termi-  
26 nation date." 87 L.R.R.M. at 1744.

27 The gist of these cases from the private sector seems to be  
28 this: employees may add any conditions to the exercise of revo-  
29 cation of their deduction authorizations they wish so long as the  
30 statutory rights to revoke at certain times are not infringed by  
31 employer-union conduct.

32 2. Complainant's Argument

Part of the Complainant's argument in the hearing and in its

1 brief is devoted to questioning the validity of MEA's continuing  
2 membership program. That issue is presented here in a unique  
3 manner when compared to the case law just discussed. The automatic  
4 renewal was agreed to by the teachers in a separate authorization  
5 form, (Joint Exhibit 3), whereas the concern in the above cases  
6 was that the employees would be subject to a renewal to which  
7 they did not individually agree. There thus appears to be no  
8 cause for concern that the teacher's rights to revoke were infringed  
9 particularly in view of the fact that Montana's section 39-31-203  
10 gives no explicit rights of revocation at certain times.

11 Complainant's brief criticized the continuing membership  
12 program because of an apparent conflict with the MEA Constitution  
13 (Joint Exhibit 1) and its provisions as to a member's right to  
14 resign from membership (Complainant's brief, pp. 5-7). The  
15 internal affairs of a labor organization should not be analyzed  
16 by this Board, however, except in an extreme case where the  
17 operations of the union constitute an unfair labor practice  
18 infringing on the employee's rights. The allegation here is not  
19 that failure to follow the MEA Constitution constitutes an unfair  
20 labor practice, but that MEA's causing the District to continue  
21 to withhold dues constitutes an unfair labor practice. Further-  
22 more, the rights that this Board is commissioned by the Legisla-  
23 ture to protect are those set out in MCA section 39-31-201, not  
24 those set out in union constitutions. This Board simply has no  
25 power to investigate charges that employee rights under a union  
26 constitution were violated, especially in a case such as this in  
27 which the employees voluntarily signed a separate authorization to  
28 deduct dues and to provide for automatic renewal of that authorizat  
29 (Joint Exhibit 3).

30 This is not to say, however, that this opinion recommends  
31 upholding the continuing membership program, although Defendant  
32 Associations' brief provides a good analysis for doing so. The  
validity of that program is a more appropriate issue for a breach

1 of contract action brought by the union against the employees or  
2 in an injunction or declaratory judgment action brought by the  
3 employees against the employer or union. No opinion need be  
4 expressed here as to whether in any such action the continuing  
5 membership program would be upheld.

6       B. The Employee's Right To Have Deductions Ceased

7       The private sector cases discussed in the previous subsection  
8 indicated that a minimum requirement for the validity of provisions  
9 for automatic renewal of deduction authorizations is that such  
10 provisions be contained in separate forms executed by the employees.  
11 Such a requirement also holds for the teachers under Montana law  
12 (see MCA section 39-31-203). Separate forms were executed by  
13 them in signing the MEA Membership Forms (Joint Exhibit 3).

14       The MEA Membership Form reads in part:

15       Method of Payment. Check One.

16       (    ) Payroll Deduction. I hereby authorize my employer  
17       to deduct the approved annual dues and related contri-  
18       butions for MEA, NEA and my local association continu-  
19       ously from year to year unless revoked by written  
20       notice to the employer and the association between  
21       August 15 and September 10 of any subsequent year.  
22       (    ) Cash.

23       That form seems to be an acceptable vehicle to authorize the  
24       employer to make deductions from employee paychecks when filled  
25       out in the proper context. Certain elements in the situation,  
26       however, prevent it from being adequate in so far as the District  
27       is concerned.

28       The case of NLRB v. Shen-Mar Food Products, Inc., 557 F.2d  
29       396 (4th Cir. 1976), a private sector decision, is instructive in  
30       this regard. The NLRB sought enforcement of its order to the  
31       respondent to honor dues check-off provisions in the collective  
32       bargaining agreement issued following a hearing regarding certain  
33       unfair labor practices (not relevant to our discussion). The  
34       collective agreement provided that the company would check off  
35       union dues from paychecks of employees who were union members and  
36       turn over the monies to the union, and that the union would

1 furnish the company individual dues deduction authorization slips  
2 voluntarily signed by the employees.

3 The company argued that it was not obligated to deduct dues  
4 from the pay of those employees who notified it that they were no  
5 longer union members because the collective agreement provided  
6 for deductions in the case of union members. The Court of Appeals  
7 agreed with the NLRB, however, that the collective agreement  
8 incorporated by reference the voluntary check-off authorizations.  
9 Id. at 399. The court said the individual authorization is the  
10 "primary requisite to the validity of any arrangement under the  
11 statute, and the Board's conclusion that the authorization and  
12 ... the agreement should be read together is consonant with the  
13 statutory pattern." Id. The court thus enforced the NLRB's  
14 order.

15 Just as under federal law, the individual authorization of  
16 deductions under Montana law is the "primary requisite to the  
17 validity" of the deduction arrangement. The employer in the  
18 public sector of Montana cannot deduct dues without that authori-  
19 zation, as section 39-31-203 makes clear.

20 As Shen-Mar shows, the employee typically agrees to the  
21 deduction twice--once in the collective agreement (which he may  
22 or may not have actually supported, but which he is deemed to  
23 have supported by being in the bargaining unit that supported it)  
24 and once in the individual authorization. He agrees in the  
25 collective agreement to the general deduction arrangement between  
26 employer and union, and he agrees in his individual authorization  
27 to have the general arrangement applied to his paycheck.

28 Paragraph 5.2 of the collective agreement here (Joint Exhibit  
29 9) provides the general arrangement:

30 The Board will deduct from the salaries of certificated  
31 staff dues for membership in the National Education  
32 Association, Montana Education Association, Kalispell  
Education Association, and the Association of Classroom  
Teachers upon authorization to make such deductions by  
the individual certificated staff member. Authorization  
will be through forms provided each certificated staff

1 member by the District. Forms will be distributed to  
2 staff in September and deductions will begin in October,  
3 and will be prorated over the remaining pay periods.  
(Emphasis added.)

4 Completing the authorization clearly seems to require a district-  
5 supplied form. That being the case, the MEA Membership Form with  
6 "Payroll Deduction" checked is no authorization at all as far as  
7 the District is concerned. The collective agreement incorporates  
8 by reference the District form (Joint Exhibit 4), presumably for  
9 the sake of the convenience of the District, and says nothing  
10 about the MEA form. The validity of the MEA form is a matter of  
11 interest entirely between MEA and its members (see the previous  
12 subsection).

13 It is true that the District form has not been used as long  
14 as it has been called for by the contract (see Finding of Fact 9,  
15 Joint Exhibits 7-9). Furthermore, as is correctly pointed out in  
16 the brief for the Defendant Associations, the District had been  
17 asked about its failure to provide the forms earlier. Teacher  
18 Mike Calvin testified that in the contract negotiations for the  
19 1977-78 contract, in which he participated, the KEA negotiating  
20 committee told the school board that it was not supplying the  
21 required forms. He said the committee received a "neutral"  
22 response from the board and was told the board would look into  
23 the matter.

24 Mr. Calvin said his 1977-78 dues were deducted on the basis  
25 of his authorization on his MEA membership form (Joint Exhibit  
26 3), but that his dues for the 1978-79 year were deducted on the  
27 basis of his authorization on a District-supplied form (Joint  
28 Exhibit 4). He said he first saw the District form the fall of  
29 1977. This squares with Mr. Trumbull's testimony (see Finding of  
30 Fact 9) that increasing reliance was placed on the District form  
31 beginning with that school year. The fact is obvious, then, that  
32 the District form is used now, as called for in the collective  
agreement, and the resolution of this matter does not depend on

1 the power of the teachers to revoke deduction authorizations  
2 during the years the form was not in use.

3 The brief of the Defendant Associations also refers to the  
4 testimony of KEA Membership Chairman Gail Atkinson that there was  
5 poor communication from Mr. Trumbull's office on how to process  
6 the continuing memberships. She said she received no reply from  
7 him after her mid-August inquiry and did not find out from him  
8 until mid-September that he was going to need District forms.  
9 Irrespective of this less-than-diligent communication from the  
10 District's office to KEA, the fact remains that the District  
11 forms were available and that they were required under the col-  
12 lective agreement. The fact further remains that the six employees  
13 in question declined to fill them out.

14 The Defendant Associations' brief tries to make relevant the  
15 provision of the District form that says the amount indicated on  
16 the form for deduction "will remain in effect until written  
17 cancellation is received or employment or [the individual contract  
18 with the payee organization] is terminated." (See Joint Exhibit  
19 4.) The brief says that both the District and MEA authorization  
20 forms "provide on their faces that they are continuing authori-  
21 zations unless timely cancelled." Defendant Associations' brief  
22 at 6. If by "timely" cancellation in the District form the brief  
23 is intended to refer to the window period of the MEA form, it has  
24 not explained how that period can apply to the cancellation of  
25 authorizations made on District forms, which do not set out a  
26 time frame. With no time frame thus set out, the District forms,  
27 signed by the six in the fall of 1978 either cancelling deduction  
28 authorizations or specifying KFT deductions (see Finding of Fact  
29 7) are sufficient to cancel the District's authority to deduct  
30 dues for MEA from their paychecks.

31 It thus having been determined the six teachers had the  
32 right to cancel the authority to deduct dues from their paychecks,

1 it is now necessary to decide whether any unfair labor practices  
2 were committed in the context of the continued deductions.

3 III. THE UNFAIR LABOR PRACTICE CHARGES

4 Defendant District is charged with violating MCA section  
5 39-31-401(1) and (2) (1978), which reads in pertinent part: "It  
6 is an unfair labor practice for a public employer to:

7 (1) interfere with, restrain, or coerce employees in the  
8 exercise of the rights guaranteed in 39-31-201....:

9 (2) dominate, interfere, or assist in the formation or  
10 administration of any labor organization ..." The rights guaran-  
11 teed in MCA section 39-31-201 (1978) are set out as follows:

12 Public employees shall have and shall be protected in  
13 the exercise of the right of self-organization, to  
14 form, join or assist any labor organization, to bargain  
15 collectively through representatives of their own  
16 choosing on questions of wages, hours, fringe benefits,  
17 and other conditions of employment, and to engage in  
18 other concerted activities for the purpose of collective  
19 bargaining or other mutual aid or protection free from  
20 interference, restraint, or coercion.

21 Defendants MEA and KEA are charged with violating MCA section  
22 39-31-402(1) (1978), which deems it an "unfair labor practice for  
23 a labor organization or its agents to:

24 (1) restrain or coerce employees in the exercise of the  
25 right guaranteed in 39-31-201...."

26 No unfair labor practice would have been committed by either  
27 the employer or the unions if there were adequate authority by  
28 the employees to deduct their union dues from their pay. Section  
29 201 rights of self-organization and of joining or assisting any  
30 labor organization hardly can be said to have been infringed when  
31 the employees have acquiesced to a system of collecting dues for  
32 the union of their choice, and the system is in accord with the  
33 requirements of section 39-31-203.

34 The provisions of sections 39-31-401 and 402, however, do  
35 not explicitly make deductions of dues in violation of section  
36 39-31-203 an unfair labor practice, nor does the latter section  
37 provide for a remedy for violations of its provisions. It says

1 merely that the employer "shall deduct" union dues from an employee'  
2 pay upon "written authorization."

3 The payment of dues, of course, is a natural responsibility  
4 that accompanies the right of joining a labor organization. One  
5 hardly could expect the organization to survive, let alone provide  
6 its services, without exacting some form of payment from its  
7 members. This being one of the cold facts of life in the world  
8 of labor relations, the "right of self-organization," of forming,  
9 joining, or assisting "any labor organization" (section 201) must  
10 ipse facto include the right of paying dues to "any labor organi-  
11 zation."

12 A. Defendants MEA and NEA

13 A similar conclusion prevails in federal law governing  
14 private sector labor relations, as shown in the case of Printing  
15 Specialties Union, above. As already discussed, that case inter-  
16 preted section 302(c)(4) of the LMRA and found that the employees  
17 had the right to revoke their deduction authorizations. The  
18 Board went on to find a violation by the union of section 8(b)(1)(A)  
19 of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A)  
20 (1976) of almost exact wording as that in MCA section 39-31-402(1),  
21 because of the union's "causing the Employer to dishonor the  
22 employees' revocation notices....., thus restraining and coercing  
23 the employees in the exercise of their statutory right to revoke  
24 their checkoff authorizations." 87 L.R.R.M. at 1745. The Board  
25 held similarly in Automobile Workers Union, 130 N.L.R.B. No. 96,  
26 47 L.R.R.M. 1449 (1961). Neither case contained much discussion  
27 as to how the unauthorized withholding of dues from paychecks  
28 violates employee rights in section 7 of the NLRA (the federal  
29 parallel of MCA section 39-31-201); both seemed to assume that  
30 the "right to self-organization, to form, join, or assist labor  
31 organizations" (section 7 of the NLRA) necessarily includes the  
32 right to pay dues to a labor organization under the procedures  
allowed by other parts of the act.

1 This is clearly correct. Thus it is an unfair labor practice  
2 for a union to coerce an employer to dishonor valid notices of  
3 revocation of deduction authorizations when the effect is to  
4 "restrain" public employees (MCA section 39-31-402(1)) in the  
5 "exercise of the right of self-organization, to form, join, or  
6 assist any labor organization" (MCA section 39-31-201).

7 Contrary to the assertion in Defendant Associations' brief,  
8 there is ample evidence that MEA significantly involved itself in  
9 the affairs of the District in encouraging the District to continue  
10 to deduct the dues. Through a phone call and two letters, MEA  
11 officials gave Mr. Trumbull's office the clear indication that  
12 MEA wanted the window period observed. (See Finding of Fact 14.)  
13 It thus is not unreasonable to assume that MEA's efforts resulted  
14 in the unauthorized deductions. Ample evidence in the record of  
15 the hearing also showed the logical result of frustration of KFT  
16 recruitment efforts and the frustration of the desires of teachers  
17 to exercise their right to join KFT. The KFT dues of two KFT  
18 members had to be absorbed by that organization which means  
19 essentially absorbed by the members of that organization, and the  
20 prospect of paying double dues discouraged some people entirely  
21 from joining KFT, the union of their choice. (See Finding of  
22 Fact 13.)

23 The record, however, does not furnish sufficient evidence to  
24 show that KEA, MEA's local, encouraged the unauthorized deduction  
25 of dues from teacher's paychecks. The indication is just the  
26 opposite, the KEA did not wish to have those dues withheld against  
27 the teachers' will. (See Finding of Fact 15.)

#### 28 B. Defendant District

29 Complainant's brief has devoted substantial space to arguing  
30 why Defendant District should be found guilty of violating MCA  
31 section 39-31-401(1) and (2) in spite of a lack of intent to  
32 interfere with teachers' rights guaranteed under section 39-31-201.  
Complainant argues from cases interpreting parallel sections

1 under the NLRA in private sector labor relations law to arrive at  
2 its conclusions.

3 These federal cases are indeed instructive for the present  
4 purposes, although the area has developed into an extremely  
5 difficult one to analyze, and a continuous evolution of the case  
6 law coupled with various approaches suggested in the other liter-  
7 ature leaves the doctrines in the area difficult to define.

8 Complainant cites Textile Workers v. Darlington Mfg. Co., 380  
9 U.S. 263 (1965), for the proposition that unlawful motive is  
10 unnecessary for a proof of a section 8(a)(1) violation (the  
11 NLRA's provision parallel to section 39-31-401(1)). The United  
12 States Supreme Court, represented in Justice Harlan's opinion,  
13 said in that case (perhaps in dictum) that

14 it is only when the interference with section 7 rights  
15 outweighs the business justification for the employer's  
16 action that section 8(a)(1) is violated... A violation  
17 of section 8(a)(1) alone therefore presupposes an act  
18 which is unlawful even absent a discriminatory motive.  
19 Whatever may be the limits of section 8(a)(1), some  
20 employer decisions are so peculiarly matters of manage-  
21 ment prerogative that they would never constitute  
22 violations of section 8(a)(1), whether or not they  
23 involved sound business judgment, unless they also  
24 violated section 8(a)(3) [which prohibits discrimi-  
25 nation to encourage or discourage union membership].

26 Id. at 269.

27 The truth is, however, that few cases in the federal sector  
28 have turned on a consideration of section 8(a)(1) alone. The  
29 trend has been to consider questions of section 8(a)(3) discrimi-  
30 nation along with questions of section 8(a)(1) coercion. Cases  
31 involving complaints of discrimination under section 8(a)(3) have  
32 developed a rather complex approach to determining whether the  
33 proscribed intent exists. See, e.g., NLRB v. Great Dane Trailers  
34 Inc., 388 U.S. 26 (1967).

35 The case at hand may be one properly considered under charges  
36 of section 39-31-401(1) coercion only, without a look at possible  
37 section 39-31-401(3) discrimination. But whether that be true is  
38 not necessary to discover in regard to the charges against Defen-

1 dant District, because I find that the District had substantial  
2 justifications for its actions of continuing to withhold the dues  
3 and place them in trust and that these justifications preclude  
4 finding a section 39-31-401(1) violation.

5 The District is party to a comprehensive agreement with a  
6 labor organization that is the exclusive bargaining representative  
7 of the employees under that contract. That contract allows for  
8 the deduction of union dues from employee paychecks by the District  
9 under certain conditions. The policies of the exclusive bargaining  
10 representative with respect to the employees and the collection  
11 of employee dues were undergoing changes while this controversy  
12 was brewing. The District had to cognize the "internal" and  
13 "external" relationships confronting it--the relationships the  
14 District had directly with both union and employees, and the  
15 relationship the District had indirectly with the union-employee  
16 interaction that has its own internal relationships. The District  
17 also had to deal with a minority union that is protected by law  
18 in certain activities.

19 The District must deal with all these matters, not only in  
20 its role as a business entity, as urged by Complainant, but in  
21 its role as a public administrator. Its motives for preserving  
22 "industrial peace" stem not only from business and financial  
23 concerns, but concerns for the public welfare. Wrong moves by an  
24 employer in the public sector not only hurt business, but adversely  
25 affect the functioning of community institutions. That is a  
26 significant difference between this case and those in the private  
27 sector cited by Complainant.

28 The conclusion is inescapable that the District took the  
29 only action it could. If it ceased deducting the dues and later  
30 found out this was improper, it would be in trouble with the  
31 union. If it continued deducting the dues, paid the money to the  
32 union, and later found out this was improper, it would be in  
trouble with the employees. Aside from the financial implications

1 of being wrong in either instance, the District would also be  
2 faced with having exacerbated a ticklish situation in community  
3 relations. By putting the deducted money into trust, the District  
4 avoided making either mistake. Perhaps it could have taken more  
5 affirmative action, such as seeking a declaratory judgment in  
6 district court, but that is irrelevant to the concerns here. The  
7 District did not violate section 39-31-401(1).

#### 8 IV. COMPLAINANT'S STANDING

9 An issue is raised in Defendant Associations' brief about  
10 the standing of Complainant KFT to raise the matters in this  
11 case. The brief alleges, first of all, that if the provision in  
12 the collective agreement that calls for a District-supplied  
13 authorization form is violated, only the parties to the contract  
14 may complain about lack of compliance with the contract. Defendant  
15 Associations' brief at 7. The brief also alleges that the internal  
16 review mechanism called for in the MEA Constitution is the proper  
17 procedure for the six teachers to follow before resorting to this  
18 Board. Id. at 13.

19 These allegations cannot be upheld in view of the discussion  
20 above finding an unfair labor practice in MEA's efforts to cause  
21 the District to withhold dues. Because employee rights under  
22 section 39-31-201 have been violated, this matter is no longer  
23 solely one of breach of contract or one for internal review  
24 within a union, if it indeed ever was one of these. No opinion  
25 is expressed here as to whether a court has jurisdiction in a  
26 contract action or as to whether the union's internal review  
27 procedure properly may be used. The point is that the Board of  
28 Personnel Appeals has initial jurisdiction in unfair labor  
29 practice matters, and it cannot ignore or delegate that juris-  
30 diction.

31 It is true that in the Printing Specialties Union and  
32 Automobile Workers Union cases discussed above, which found  
unions similarly guilty of unfair labor practices, individuals

1 made the complaints rather than rival unions. But in those  
2 cases, it is not clear that the employees seeking to cease dues  
3 deductions were members of a rival union. The six affected  
4 teachers could alone have brought the action here, but the unfair  
5 labor practices affected all the KFT members, who had to share  
6 the expense of union dues for two members (see Finding of Fact  
7 13) and who had to have their rights of self-organization frus-  
8 trated by the fears of some MEA members that they could not join  
9 another union at this time. Nothing in the Montana act for  
10 collective bargaining for public employees requires a union to be  
11 the exclusive bargaining representative before it can represent  
12 employees whose section 39-31-201 rights have been violated. It  
13 would be an empty technicality that would cause dismissal of this  
14 action simply because the action was brought in the name of a  
15 union rather than in the names of the individual employees within  
16 that union.

#### 17 CONCLUSIONS OF LAW

18 (1) Defendant Flathead County School District No. 5 has not  
19 violated MCA section 39-31-401(1) and (2) (1978).

20 (2) Defendant Montana Education Association has violated MCA  
21 section 39-31-402(1) (1978) by restraining and coercing employees  
22 in the exercise of the right guaranteed in MCA section 39-31-201  
23 (1978) and by causing Defendant District to withhold monies in  
24 the amount of dues of MEA.

25 (3) Defendant Kalispell Education Association has not vio-  
26 lated section 39-31-402(1).

#### 27 RECOMMENDED ORDER

28 It is hereby ordered that the Montana Education Association  
29 request in writing that the Flathead County School District No. 5  
30 refund the withheld dues to the six employees. It is further  
31 ordered that MEA cease and desist from causing the District to  
32 withhold dues from employee paychecks in the future when those  
employees wish to withdraw their deduction authorizations, so

1 long as the collective agreement between MEA and the District  
2 calls for District-supplied authorization forms and those forms  
3 do not restrict the employees to withdrawing their authorizations  
4 during a valid window period.

5 Dated this 12<sup>th</sup> day of September, 1979.

6  
7 Barry F. Smith by Robert K. Jensen  
8 Barry F. Smith  
9 Hearing Examiner

10 NOTICE

11 The rules of the Board of Personnel Appeals and the provision  
12 of the Montana Code Annotated provide that any party may file  
13 written exceptions to these FINDINGS OF FACT, CONCLUSIONS OF LAW  
14 AND RECOMMENDED ORDER within twenty days after they are served on  
15 the parties. If no exceptions are filed with this Board within  
16 20 days, then the Recommended Order shall become the Final Order  
17 of this Board.

18 CERTIFICATE OF MAILING

19 I, Jennifer Jacobson, hereby certify that I did on the  
20 12 day of September, 1979 mail a true and correct copy of the  
21 above FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER  
22 to the following:

23 Emilie Loring  
24 Hilley and Loring, P.C.  
25 1710 10th Avenue South  
26 Great Falls, MT 59401

27 Cordell Brown  
28 Montana Federation of Teachers  
29 P.O. Box 1246  
30 Helena, MT 59601

31 Ted O. Lympus  
32 Flathead County Attorney  
Flathead County Courthouse  
Kalispell, MT 59701

Jennifer Jacobson

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